

DECISION



THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

FILE: B-185787

DATE: August 3, 1976

MATTER OF: NJE Corporation

DIGEST:

1. Allegation that Navy was required to award protester a contract because equipment offered was included in protester's mandatory Federal Supply Schedule contract is without merit since Schedule contract is not included among those which are mandatory for use by Department of Defense.
2. Cancellation of request for proposals is proper where agency determines that negotiation rather than formal advertising is no longer justified.
3. Statement in list of salient characteristics in brand name or equal purchase description that agency would "prefer open frame, if cheaper than enclosed frame," is not indefinite or ambiguous; rather, it removed potentially restrictive feature of brand name product, thereby enhancing competition.
4. Failure to acknowledge solicitation amendments which notified offerors that "x" in Box 2 of Standard Form 33 should be in box preceding "advertised (IFB)" rather than in box preceding "negotiated (RFP)" and changed solicitation to a "B" number may be waived as minor informality since amendments would not have more than trivial effect on price or quality of equipment to be furnished and since it appears that low bidder was aware of the thrust of the amendments.

This protest by NJE Corporation involves the conduct of the Naval Regional Procurement Office, Long Beach, California (Navy), with respect to the procurement of quantities of two items specified as Lambda Electronics Corporation power supplies or equal.

The procurement was initiated by issuance of request for proposals (RFP) No. N00123-76-R-0693 on December 12, 1975. NJE was one of six offerors submitting proposals. After the

closing date for receipt of proposals, NJE protested against award to any other firm, arguing that only it offered items available from a mandatory Federal Supply Schedule. The Navy then canceled the RFP because its review had shown that authority to negotiate this particular procurement did not exist. On February 10, 1976, solicitation No. N00123-76-R-0991 was issued for the identical Lambda power supplies. Although this solicitation also indicated it was an RFP, it was subsequently amended to an invitation for bids (IFB) and its number was changed to N00123-76-B-0991. Award was made to Powermate Corporation, the low responsive bidder under the IFB, on April 7, 1976.

NJE advances several grounds for objecting to the Navy's actions in this case. First, as indicated above, it maintains that the Navy was required to purchase the power supply units from NJE under a mandatory Federal Supply Schedule contract. Second, it objects to cancellation of the RFP. Third, it alleges that the IFB specifications were defective in that they did not clearly define the agency's minimum requirements. Fourth, NJE argues that it submitted the only responsive bid under the IFB because the other bidders, including the awardee, failed to acknowledge Amendment Number 0002 which changed the solicitation from "Negotiated (RFP)" to "Advertised (IFB)." We find, for the reasons indicated below, that none of these objections has merit.

The General Services Administration annually enters into a multitude of Federal Supply Schedule contracts. See 41 C.F.R. § 101-26.401 et seq. (1975). Many of these Schedule contracts are mandatory for use by Federal agencies. 41 C.F.R. § 101-26.401-1. Others are optional for use. 41 C.F.R. § 101-26.401-5. Armed Services Procurement Regulation (ASPR) § 5-102.3 (1975 ed.) lists by Federal Supply Group the Schedules which are mandatory for use by the Department of Defense (DOD). ASPR § 5-103 further provides that DOD contracting officials shall order from certain Schedules which are not mandatory on DOD if, inter alia, the items to be ordered are identified by National Stock Number. NJE argues that its Schedule contract is included under FSC Group 66 which is one of the mandatory listings in ASPR § 5-102.3. However, the listing for Group 66 specifies "PART III", while NJE's equipment is on Part II of the Group 66 Schedule. Furthermore, we understand that a national stock number has not been assigned to the equipment being procured. Thus, it cannot be concluded that the Navy was required by either ASPR § 5-102.3 or ASPR § 5-103 to order the power supply units from NJE's Schedule contract.

NJE objects to the cancellation of RFP No. N00123-76-R-0693 because "there was nothing improper" in the use of negotiation to procure power sources. However, formal advertising is the statutorily preferred method of procurement. 10 U.S.C. § 2304(a) (1970). Contracts may be negotiated only where it is not feasible and practicable to procure by formal advertising and where an agency determines that negotiation is necessary under one of the several exceptions enumerated in 10 U.S.C. § 2304(a). Here the Navy initially determined that negotiation was necessary because of indefinite specifications. However, it subsequently determined that it had specifications that would permit full and free competition within the framework of formal advertising. This action by the Navy was entirely consistent with applicable statutory and regulatory provisions and is not legally objectionable. See 53 Comp. Gen. 564 (1974), 74-1 CPD 55.

The protester's objection to the specifications is based on the statement in the list of salient characteristics, identified in the IFB as a critical features list, that the Navy would "Prefer open frame, if cheaper than enclosed frame." The brand name listed in the specifications has an enclosed frame. NJE argues that "either they require Lambda model or equal power supplies or they require 'open frame' supplies." In NJE's view, such a statement in the specifications does not clearly show the Government's minimum needs and renders the specifications ambiguous.

We disagree. We think the specifications unambiguously state the Government's minimum needs. The provision permitting an open frame power supply is not ambiguous; it indicates to potential offerors that the enclosure provided on the brand name power supply is not a critical feature for Navy purposes. This provision in effect eliminated a potentially restrictive feature of the brand name supply, thereby enhancing competition. We see nothing objectionable with regard to the use of such a provision.

There remains for consideration NJE's contention that all bids other than its own should be rejected since they failed to acknowledge Amendments 0001 and 0002. Amendment 0001 changed the solicitation number from N00123-76-R-0991 to N00123-76-B-0991. Amendment 0002 read:

"Standard Form 33 - Solicitation Offer and Award, Page 1 of 21, Block 2

DELETE: Negotiated (RFP)

SUBSTITUTE: Advertised (IFB)."

NJE argues that this failure to acknowledge the amendments is a material defect in the other bids for three reasons: (1) "if an offeror believed he was responding to a negotiated RFP (rather than an advertised IFB) it would * * * have a significant effect on the manner in which the offeror computes his offer," thereby affecting the price bid; (2) since an offeror responds to a negotiated solicitation with the expectation of negotiation, the Navy, absent acknowledgment of the amendments, cannot be certain that the bidder is committing itself to supply precisely what is required by the specification; and (3) an amendment which changes the basic manner in which a procurement will be conducted cannot be treated as de minimis. The Navy, on the other hand, believes that a bidder's failure to acknowledge amendments which changes the check mark on the IFB form from "negotiated" to "advertised" and the solicitation number from an "R" number to a "B" number is not material and may be waived by the contracting officer under ASPR § 2-405 as a minor informality or irregularity.

We agree with the Navy. Where an amendment could affect price, quantity or quality the failure of a bidder to acknowledge receipt of that amendment prior to bid opening is material and renders the bid nonresponsive. 51 Comp. Gen. 408 (1972); 49 Comp. Gen. 459 (1970); 37 Comp. Gen. 785 (1958). If, however, the amendment would have only a trivial effect on price, quality or quantity, a failure to acknowledge the amendment may be waived. 52 Comp. Gen. 544 (1973); 41 Comp. Gen. 550 (1962). Here we do not believe that the amendment could have had more than a trivial effect on quality or price. In this regard, we do not agree with NJE that a firm would compute its offer differently in response to an RFP or that it would offer something inconsistent with RFP requirements, since a RFP puts offerors on notice that award may be made without discussions and that a failure to offer that firm's best price is at the risk of the offeror. Furthermore, it appears that in this case bidders probably were aware of the thrust of the amendments. As stated by the Navy:

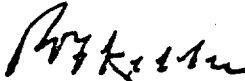
"Of significance in the resolution of the issue is the fact that the pages of the solicitation other than the face page contained the schedule number with a 'B' and not the mistaken 'R'. Furthermore, the General Provisions of the solicitation did

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not include the clause ASPR 7-104.41, 'Audit by Department of Defense,' which clause is required in negotiated procurements under \$100,000, but not in advertised procurements below that dollar threshold. The offerors in the instant procurement had each previously offered on a Request for Proposals for the same requirement, which request had been cancelled immediately prior to the issuance of the subject Invitation for Bids. Finally, the announcement of the replacement solicitation appeared in the Commerce Business Daily of February 17, 1976, and the announcement specifically referred to the solicitation as an IFB."

Under these circumstances, we think the Navy properly waived the low bidder's failure to acknowledge receipt of the amendments.

Protest denied.


Deputy Comptroller General
of the United States